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IN THE

Supreme Court of the United States

October Term, 1958

No. [redacted]136

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Delaware, Lackawanna and Western Railroad Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered February 26, 1959 (App. 10), together with the underlying decision of that Court dated February 26, 1959 (App. 1). Rehearing denied April 2, 1959 (App. 13). These reversed judgment of the United States District Court for the Middle District of Pennsylvania for the value of petitioner's property taken in condemnation by the United States of America.

OPINIONS BELOW

The report of the Commission appointed by the District Court to determine fair value of the property taken is printed in joint appendix filed on appeal to the Court of Appeals at page 364a. The opinion of the District Court printed in the joint appendix at page 412a is reported in 154 F. Supp. 770. The opinion of the United States Court of Appeals printed in appendix hereto at page 1 is reported in Advance Sheets April 27, 1959, 264 F. 2d 112.

JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1959 (App. 10). Rehearing denied April 2, 1959 (App. 13). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and under the Fifth Amendment of the Constitution of the United States.

QUESTION PRESENTED

In condemnation brought by the United States, is the owner of the land and buildings taken deprived of just compensation where prior to the taking the owner had leased the premises to a private business corporation engaged in producing and selling ordnance to the United States Army and lessee had, pursuant to its covenants in the lease, repaired, renovated and altered the property at lessee's cost when the owner is not allowed to recover the value resulting from lessee's repairs, renovations and alterations because the United States had reimbursed the lessee for lessee's cost of making them?

STATEMENT OF THE CASE

On January 15, 1953, The Delaware, Lackawanna and Western Railroad Company, owner in fee of the land and buildings here involved, leased the same to the United States Hoffman Machinery Corporation, a private business corporation (Joint App. 318a). Hoffman, the lessee, then had or expected to have contracts with the United States Government for production of artillery shells (Joint App. 342a). The lease provided, inter alia, that lessee would occupy and use the premises for this and other heavy manufacturing purposes (Article *Tenth*, Joint App. 330a); would at its sole cost and expense make all necessary repairs and keep the premises in good repair (Article *Nineteenth*, Joint App. 336a); at its sole cost and expense do the work of renovation and alteration required to adapt the premises to its uses (Articles *Eighth* and *Ninth*, Joint App. 328a-329a).

On August 24, 1954, during Hoffman's occupancy under the lease, the United States condemned and took the leased premises. Between the date of leasing and the date of taking, Hoffman, the tenant, pursuant to the express conditions of the lease had repaired, rehabilitated and altered the buildings. The material used in the work of repairs, restoration and alteration were so incorporated in the premises as to be an integral part of the physical structures. For example, deteriorated roofs, floors, window frames and plumbing facilities were torn out and replaced (Joint App. 202a-209a; Deft's. Ex. No. 5, 350a-352a). On April 15, 1954, upon renewal of the lease Lackawanna,

lessor, waived any right that it might have under the lease to require Hoffman, the lessee, to remove any of the repairs or alterations at the end of the lease term (Joint App. Deft's Ex. No. 5, 350a-352a).

At the trial of the issue of fair value it was shown that tenant repairs, rehabilitations and alterations had given added value to the property (Joint App. 160a, 263a, 373a); that Hoffman, the tenant, had contracted for this work and had paid its contractors (Joint App. 202a-209a); that the United States had reimbursed the tenant for this expense pursuant to a "facilities" contract (not in evidence) between Hoffman and the United States (Joint App. 218a-220a).

Lackawanna, the landowner, claimed that it was entitled to the value of the property as of the date of taking which included the value resulting from tenant repairs, renovations and alterations. The United States claimed that because it had reimbursed Hoffman, the lessee, for the cost thereof it should not upon condemnation be required to pay for the resulting value. The District Court following long established principles of Pennsylvania landlord and tenant law and long established principles of Federal law of condemnation held that the value resulting from the tenant's repairs and alterations was the property of the landowner by virtue of the contract of lease and the Government having taken it must pay for it. The Court of Appeals reversed, holding that the United States, by reimbursing the tenant, had acquired an interest in the property so that on condemnation the value to which the landowner was entitled was the value before the tenant repaired and altered the property.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has denied to petitioner compensation for a value expressly contracted for as part of the consideration for leasing petitioner's property to a lessee for lessee's use in carrying out its business for profit. The case is important not only to every individual whose property and private contracts are taken by Government but to all who supply property to a private business engaged in supplying the needs of Government.

In denying petitioner compensation for the benefits of petitioner's contract the court below has expressly rejected as erroneous the decision of the Court of Appeals for the Fifth Circuit in the case of *United States v. 5 Parcels of Land in Harris County, Texas*, 180 F. 2d 75 (certiorari denied, 340 U.S. 812), wherein the landowner was held entitled in condemnation by the United States to a value resulting from dredging, levelling and filling the land, done by a lessee who was paid by the United States for so doing.

In declining to follow the decision in Harris the court below lumped together as similar, in fact and consequence, such claims as were asserted by landowners in *Searl v. School District*, 133 U.S. 553, 33 L. Ed. 740; *Bibb County v. United States*, 249 F. 2d 228 (5 Cir. 1957); *Anderson-Tully Co. v. United States*, 189 F. 2d 192 (5 Cir. 1951); *United States v. Smith*, 110 F. 338, with such as were made in Harris and by petitioner here. The last cited cases are typical of many cases where landowners unsuccessfully claimed the value of buildings, railroad tracks, life saving stations, power plants and the like brought on and added to the land, but there is certainly a distinction between such sort of claims and the claims made in Harris and by

petitioner here. Petitioner's claim here was simply for the value of petitioner's land and buildings which petitioner had leased to Hoffman as increased by Hoffman's fulfillment of its express covenants to repair and restore petitioner's property. Petitioner made no claim here for the new buildings, power plant and other heavy installations of facilities and machinery brought on to and affixed to petitioner's property, nor was any such value allowed (Joint App. 384a-385a and 418a). The court below in denying the petitioner the full value of the reversion said:

> "Thus the intention of the parties is abundantly clear that the lessor railroad was entitled to receive back at the term's end no more than what it delivered at the beginning. Nothing would have prevented the lessee from removing all the improvements made to the property during the leasehold term so long as the property was returned at term's end in substantially the condition it was delivered. No accessions to the property during the term would give the railroad ownership of more than it had in the beginning and was entitled to at the end. That the lessee for practical considerations of cost would not have removed the new roof and windows, torn up new floors and paving, nor taken out new plumbing all in order to effect a restoration to the original state is irrelevant to this proceeding. What the reversioner would in all probability have gotten at the end of the term is not entirely pertinent in evaluating the property; rather, it is what the reversioner was entitled to as of right at the end of the term." (App. 7)

Thus, reducing lessee's express covenants to a gratuity, the benefit of which petitioner would have got only because the

tenant chose not to spend the money to replace the new roofs with old and generally return petitioner's property to its former condition of disrepair. The result is reached by a finding of intent in certain portions of Article *Twenty-Ninth* of the lease (Joint App., Deft's. Ex. No. 1, 339a), without reference to the express covenants of lessee provided for in Articles *Eighth* (Joint App. 328a), *Ninth* (Joint App. 329a) and *Nineteenth* (Joint App. 336a). It seems clear enough that removal of new buildings, heavy installations of machinery and facilities could result in structural damage to petitioner's property and that the lessee agreed to restore any such damage. But contrary to the finding of the Commission as to intent (Joint App. 378a) and of the District Court (Joint App. 425a) and indeed contrary to the long settled law of Pennsylvania that regardless of intent chattels so incorporated in a building as to be an essential and integral part thereof and which cannot be removed without material damage to themselves or to the building become real estate when so incorporated, *Schnebbe v. Sandt Estate*, 365 Pa. 287, 74 Atl. 2d 104, the Court below has found an intent that lessee have a right to rip out of petitioner's buildings the promised repairs.

But the opinion below is essentially based on the proposition that the United States by reimbursing Hoffman, petitioner's lessee, acquired an "interest" in petitioner's property prior to condemnation, which "interest" introduced into the condemnation proceedings "an unanticipated and disrupting influence into the previously existing relationship" (App. 8). The path of due process followed in thus transferring from the petitioner to the United States the value of the reversion as increased by

lessee's compliance with the terms of the lease is not disclosed. The value of petitioner's property was also increased by the fact that it was occupied under a lease requiring lessee to pay rent and taxes. It can scarcely be supposed that petitioner could be deprived of this value without compensation had the United States reimbursed lessee for these expenses. Yet a promise to pay rent and a promise to repair and restore at lessee's expense are no different for both are considerations paid for use and occupancy. Putting the United States "in the shoes of the lessee for some purposes at least" (App. 8) accomplishes no more than to obligate the United States to do exactly what Hoffman had agreed to do.

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. United States v. Central P. R. Co., 118 U.S. 235, 238, 30 L. Ed. 173, 174, 6 S. Ct. 1038; United States v. Northern P. R. Co., 256 U.S. 51, 64, 67, 65 L. Ed. 825, 828, 830, 41 S. Ct. 439."
>
> *Lynch v. United States*, 292 U.S. 571, at p. 579, 78 L. Ed. 1434, at p. 1440.

When the United States chose to pay the consideration asked for use and occupancy rather than take the property it is not, when it later condemns, paying again for the same thing.

> "Counsel for the Government now urges that 'if the Commissioners' award is allowed to stand the government is placed in the ridiculous position of hav-

ing to pay not only for the land taken but also for the improvements placed on the land by the United States for the use of the United States'. A brief answer to this argument is that it ignores entirely the obligation which the Government undertook with respect to the improvements when it entered into the lease. No doubt had the Government acquired the fee in this tract in 1944, when it was unimproved, the cost of it would have been much less than it is now required to pay. But instead it decided to lease the land under a contract whereby, in consideration for its use, it enhanced the value of the property."

United States v. Certain Parcels of Land in Warren County, Va., 90 F. Supp. 27, 34.

What was done here by petitioner, by Hoffman and by the United States was done purposefully. There is no fortuitous event involved. Application in this context of rules designed to prevent unjust enrichment or a windfall can be justified only if the sovereign rights of government are something more than heretofore supposed and the sovereign rights of the governed something less.

CONCLUSION

The questions involved in the decision of the Court of Appeals are important. The United States contracts with a great many private businesses which in turn contract with a vast number of other private parties. The consequences of such contractual relationships are important to all of them. The taking of private property for the uses and purposes of Government is common and widespread. The decision of the Court of Appeals is disruptive of contractual rights and obligations and such a denial of just compensation as to merit review by this Court.

Respectfully submitted,

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